

February 25, 2009

**DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY**

Appeal

Name of Petitioner: State of New York

Date of Filing: January 9, 2009

Case Number: TFA-0289

On January 9, 2009, the State of New York (New York) filed an Appeal from a determination issued to it by the Department of Energy's (DOE) Office of Electricity Delivery and Energy Reliability (OE). In that determination, OE released some documents in response to a request for information that New York filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require DOE to release certain withheld information.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.

I. Background

In December 2007, New York filed a FOIA request with DOE for correspondence between DOE, CRA International, and transmission developers or stakeholders regarding an August 2006 Congestion Study and an October 2007 National Interest Electric Transmission Corridor (NIETC) Designation Order.¹ DOE released some information to New York in a July 2008 determination letter. In the determination, DOE released 82 documents, some redacted, and an index. On August 11, 2008, New York filed an Appeal from the determination. OHA issued a decision on October 6, 2008, that granted the appeal in part. In that decision, OHA ordered that OE disclose certain portions of Document 27, or issue a new determination justifying its withholding. OHA also ordered that OE issue a new determination regarding Documents 23(a) and 26, or issue a new

¹ CRA International (CRAI) is a subcontractor to the prime contractor in the August 2006 Congestion Study. CRAI was tasked to collect and analyze transmission data and transmission studies. CRAI submitted its analyses to the prime contractor and to DOE staff, who then drafted the study with graphics assistance from CRAI. *See* Electronic mail message from Marshall Whitenton, Deputy Assistant Secretary, DOE, to Dave Petrush, OHA Staff Attorney (September 9, 2008).

determination, “explaining whether the OE has fully adopted them, either formally or informally.” *See State of New York*, Case No. TFA-0271 (October 6, 2008).

OE issued a new determination letter to New York on December 5, 2008, in which it released additional documents but continued to withhold portions of Documents 23(a), 26, and 27. Letter from OE to New York (December 5, 2008). On January 9, 2009, New York filed this appeal requesting that OHA order OE to release Documents 23(a), 26, and 27. As an initial matter, New York contends that DOE applied Exemption 5 to the documents in error. New York further argues that OE has “failed to state any legitimate basis in law or fact for continuing to withhold those documents.” Appeal at 1. New York also alleges that DOE erred in denying New York access to these documents under Exemption 5 because the documents contained factual statements and had been seen by third parties who are not DOE employees. Appeal at 1. New York therefore asks OHA to order the release of the withheld information.

II. Analysis

A. The Deliberative Process Privilege of Exemption 5

Exemption 5 permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974). This deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by this privilege, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

1. Document 27

New York contends that OE “continues to withhold a portion of information that the OHA determined should be disclosed (Document 27)” Appeal at 1. We reviewed the OHA order, and conclude that this portion of the appeal should be denied because OE has followed the directions of the order.

Document 27 is a copy of a three-sentence electronic mail message. The OHA order states, in pertinent part, “*although the OE properly withheld the first sentence*, the OE must disclose the second and third sentences.” TFA-0271, October 6, 2008 (emphasis added). OE stated in its determination that it was “continuing to withhold one sentence that the October 6 Order upheld as ‘deliberative because it associates the email’s author with a position that the DOE took in response to particular comments.’” Letter from OE to New York (December 5, 2008) (Determination) at 1. OE went on to say that it was “releasing the next two sentences, which were previously withheld.”

Id. OE released the last two sentences to New York. Therefore, we find that OE properly withheld the first sentence of Document 27.

2. Applicability of Exemption 5

Exemption 5 protects documents that would reveal the decision-making process that results in a final agency decision. Thus, we focus our analysis on the effect that release of the responsive material would have on the process of arriving at an agency final decision. *Schell v. HHS*, 843 F.2d 933, 940 (6th Cir. 1988) (stating that in an Exemption 5 case, courts now focus less on the material sought and more on the effect of the release of the material). The ultimate issue in evaluating any deliberative process privilege claim is “whether the materials bear on the formulation or exercise of agency policy-oriented judgment.” *City of Virginia Beach, Va. v. Department of Commerce*, 995 F.2d 1247, 1254 (4th Cir. 1993).

This office has conducted a *de novo* review of the documents at issue, and we conclude that Documents 23(a), 26 and 27 contain material that is pre-decisional and deliberative. Document 23(a), as described by OE, “contains preliminary questions and issues that were part of the deliberative process in defining the scope and direction of the project.” Determination at 1. The document was created during the planning stages of the Congestion Study. We agree with OE that the document is pre-decisional and deliberative. Document 26, titled “Analysis of Implications of Transmission Congestion in PJM and NYISO,” is a draft that DOE received in December 2006, and was a basis for a document that was finalized in March 2007. This document is also predecisional. Release of the document would reveal the thought process that the DOE employees and their consultants used to arrive at the final document. Further, we have previously concluded that the first sentence of Document 27 is deliberative. *See* discussion *supra* Section II.A.1. Thus, release of this information could have a chilling effect on employees who are tasked to create policy in the future.

New York also argued that the documents are not protected under Exemption 5 because they were seen by third parties. OE provided information on all recipients of Documents 23(a), 26, and 27. *See* Memorandum from Theresa Brown Shute, OE, to Valerie Vance Adeyeye, OHA Staff Attorney (January 26, 2009). The recipients were DOE employees, DOE contractors, and CRAI employees. We have previously found that the CRAI employees are “government consultants” and that their communication with DOE employees and DOE contractors regarding these documents is protected. *See State of New York*, Case No. TFA-0271 (2008).

In summary, we find that DOE properly applied the protection of Exemption 5 to the responsive material. The documents in question are communications between employees and government consultants who assisted in the agency study. The material documents the discussions and analysis that transpired during the creation of the policy. Therefore, based on the content of the documents, we find that the material is deliberative and exempt from disclosure under Exemption 5.

B. Segregability of Non-Exempt Material

The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt” 5 U.S.C.

§ 552(b). However, if factual material is so inextricably intertwined with deliberative material that its release would reveal the agency's deliberative process, that material can be withheld. *Radioactive Waste Management Associates*, Case No. VFA-0650 (March 2, 2001). OE released the headings of Documents 23(a) and 26, but did not address the issue of segregability in the determination. This office reviewed all of the material that was withheld in its entirety and, based on our review, we find that OE should reconsider the issue of segregability in Document 26. OE has disclosed non-exempt material in Documents 23(a) and 27. However, our review of Document 26 concluded that the document may contain some factual, segregable material that could be released to the requester without revealing the deliberative process. For example, Paragraph 3 of Page 4 in Document 26 contains some information that appears to be factual and segregable. Non-exempt material that is "distributed in logically related groupings" and that would not result in a "meaningless set of words and phrases" may be subject to disclosure. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). Accordingly, this portion of the Appeal is remanded to OE.

C. Public Interest

The fact that the material requested falls within a statutory exemption does not preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest."

10 C.F.R. § 1004.1. *See also Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act*, President Barack Obama (January 21, 2009) (stating that "[t]he presumption of disclosure should be applied to all decisions involving FOIA").

We find that release of the withheld material would not be in the public interest. Although the public does have a general interest in learning about the manner in which the government operates, we find that interest to be attenuated by the fact that the withheld information is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. *See L. Daniel Glass*, Case No. TFA-0150 (October 16, 2006).

It Is Therefore Ordered That:

(1) The Appeal filed by the State of New York on January 9, 2009, OHA Case No. TFA-0289, is hereby granted as specified in Paragraph (2) below and denied in all other aspects.

(2) This matter is hereby remanded to the Office of Electricity Delivery and Energy Reliability of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the

district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 25, 2009